COPY

Office - Supreme Court, U. S.
FILED
JAN 14 1955
HAROLD B. WILLEY, Clerk

No. 105.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954.

---

FRANCIS G. A. O'NEILL,
Petitioner,

vs.

THE BALTIMORE & OHIO RAILWAY COMPANY,
Respondent.

---

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

---

## BRIEF OF PETITIONER ON MERITS.

---

C. RICHARD GRIESSER,
8 E. Broad St., Columbus 15, Ohio,
Attorney for Petitioner.

BYRNE LAW PRINTING AND PUBLISHING, INC., Columbus 15, Ohio

## INDEX.


| | |
|---|---|
| Opinion in the court below | 1 |
| Jurisdiction of this court | 2 |
| Statutes involved | 3 |
| Questions presented for review | 4 |
| Statement of the case | 5 |
| Argument | 10 |
| Summary | 10 |
| Questions 1 and 2 | 12 |
| Question 3 | 18 |
| Question 4 | 21 |
| Conclusion | 23 |


### Cases Cited.


| | |
|---|---|
| Atchison, T. & S. F R. Co. v. Simmons, 153 Fed. (2d) 206 | 16 |
| Bailey v. Central Vermont R. Co., 319 U.S. 350 | 15 |
| Cole v. Ralph, 252 U.S. 286 | 25 |
| Central R. Co. of N.J. v. Piluso, 286 Fed. 661 | 13 |
| Chicago & N. W. R. Co. v. Green, 164 Fed. (2d) 55 | 15 |
| Eker v. Pettibone, 110 Fed. (2d) 451 | 13 |
| Fink v. N. Y. C. R. Co., 144 Oh. St. 1 | 17 |
| Gleeson v. Virginia R. Co., 140 U.S. 435 | 16 |

Jesionowski v. Boston & Maine R. Co., 329 U.S. 452 ..... 12, 15
Johnson v. United States, 333 U.S. 46 ..... 12, 14
Kiefer-Stewart Co. v. J. E. Seagram & Sons, Inc., 340 U.S. 211 ..... 24
Korte v. N. Y., N. H. & H. R. Co., 191 Fed. (2d) 86 ..... 20
Landon v. United States, 197 Fed. (2d), 128 ..... 21
Lavender v. Kurn, 327 U.S. 645 ..... 13
Masterson v. Pennsylvania R. Co., 182 Fed. (2d) 793 ..... 21
Palmer v. Hoffman, 318 U.S. 109 ..... 11, 19
Pitcairn v. Perry, 122 Fed. (2d), 881 ..... 13
Propper v. Chicago, R. I. & P. R. Co., 54 N. W. (2d) 840 ..... 13, 16
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 ..... 24
Sweeney v. Erving, 228 U.S. 233 ..... 11, 13, 17, 18
Sweeting v. Pennsylvania R. Co., 144 Fed. (2d) 611 ..... 13
Taylor v. Reading Co., 83 Fed. Supp. 80 ..... 13
Terminal R. Assoc. of St. Louis v. Staengel, 122 Fed. (2d) 271 ..... 16

**Statutes.**

U.S.C., Title 28, Sect. 1254 (1); 62 Stat. 928 ..... 2
U.S.C., Title 28, Sect. 1732; 65 Stat. 206 ..... 11, 19
U.S.C., Title 45, Sect. 51; 53 Stat. 1404 ..... 2, 5, 15

**Authorities.**

Wigmore on Evidence, Vol. III, 3rd Ed., p. 630 ..... 19

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954.

No. 105.

FRANCIS G. A. O'NEILL,
Petitioner,

vs.

THE BALTIMORE & OHIO RAILWAY COMPANY,
Respondent.

## BRIEF OF PETITIONER ON MERITS.

## I.

## OPINION IN THE COURT BELOW.

On March 2, 1954, the United States Court of Appeals for the Sixth Circuit reversed the judgment of the United States District Court for the Southern District of Ohio and remanded the case for a new trial (R. 174). The opinion is reported in 211 Fed. 2d 190 (R. 174-184). The order of the United States District Court denying respondent's motion for judgment in accordance with a directed verdict (R. 160) and the order overruling respondent's motion for a new trial (R. 161) were entered without opinion.

## II.

## JURISDICTION OF THIS COURT.

The judgment of the United States Court of Appeals for the Sixth Circuit under review was dated and filed March 2, 1954 (R. 174). Petitioner filed petition for certiorari on June 1, 1954, and this Court granted certiorari on October 14, 1954 (R. 184).

Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit is conferred upon this Court by the provisions of the Act of June 25, 1948, C. 646, 62 Stat., 928; U.S.C. Title 28, Section 1254 (1), which provides:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

## III.

## STATUTES INVOLVED.

Two statutes passed by Congress are involved in this review. Section 51 of the Federal Employers' Liability Act (Title 45, U.S.C., Section 51) provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states or Territories or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the states or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative,

for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier as entitled to the benefits of this chapter." Apr. 22, 1908, C. 149, Section 1, 35 Stat., 65; August 11, 1939, C. 685, Sect. 1, 53 Stat., 1404.

Section 1732 of Title 28, U.S.C., is also involved and the portion pertinent to this review provides:

"(a) In any court of the United States, and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of such business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing of record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind. * * *" June 25, 1948, C. 646, 62 Statute, 945, as amended August 28, 1951, C. 351, Sections 1, 3, 65 Statute, 206.

## IV.

## QUESTIONS PRESENTED FOR REVIEW.

1. In an action under the Federal Employers' Liability Act where the uncontroverted evidence shows that a heavy ash pan was hoisted by a manual jack operated from above by another employee of the respondent railroad and that the ash pan fell and struck petitioner, a boilermaker, because a bolt supplied from respondent's stock bin suddenly and without explanation broke, was the District Court correct in submitting the case to the jury on a permissible inference of defendant's negligence under **res ipsa loquitur**?

2. Did the Court of Appeals for the Sixth Circuit correctly hold that the District Court should have granted respondent's motion for a directed verdict upon the ground that although the evidence reasonably supported an inference of negligence on the part of respondent, such inference was **rebutted as a matter of law** by evidence that petitioner selected two new bolts from respondent's stock bin and that respondent customarily purchased such bolts from another company?

3. May x-ray reports, made by specialists to respondent's doctor and at his request and incorporated into the records of a hospital, be admitted into evidence on cross examination of that doctor under the provisions of Section 1732, Title 28, U.S.C.?

4. When such x-rays reports were admitted into evidence on cross examination of respondent's doctor to show the basis for the doctor's previously stated opinion on direct examination and were limited by the court to that purpose, was error prejudicial to the respondent committed when the court later commented on those reports to the jury?

## V.

## STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against the respondent railroad, defendant below, in the Federal District Court for the Southern District of Ohio. The basis for that court's jurisdiction was that petitioner and respondent were engaged in interstate commerce and the furtherance thereof at the time of petitioner's injuries. The provisions of the Federal Employers' Liability Act (Title 45, U.S.C., Sections 51 and following) were, therefore, invoked.

At the trial the testimony of petitioner concerning the facts of the accident was uncontroverted. On the day of the accident, June 22, 1948, petitioner, employed by respondent as a boilermaker in Newark, Ohio, was assigned to install a heavy ash pan into a locomotive of respondent (R. 7). Petitioner accordingly went to respondent's supply room and picked out among other things two new, half-inch bolts of the usual type and size for performing the job in question (R. 10, 35, 47). After burning holes in the sides of the ash pan, petitioner and his helper, Jaynes, fastened a chain onto each side of the ash pan and across the interior and secured the ends of the chain to the sides with bolts, nuts and washers (R. 10-12). The ash pan was then placed into position in the pit underneath the locomotive (R. 12). A hook connected to a pull jack was then hooked onto the chain extending from side to side of the ash pan. The helper, Jaynes, in the firebox above manually operated the jack hoisting the ash pan, while petitioner in the pit below steadied and guided the ash pan until it was hoisted to the

position where it was to be inserted into the engine (R. 13-16).

While the ash pan was suspended, one of the bolts broke and the right side of the ash pan fell, striking petitioner and wedging him between the pan and the frame of the locomotive (R. 16, 17). At the time the pan was raised, petitioner's helper, Jaynes, was in the firebox above, and petitioner did not communicate with him (R. 29). During that time, moreover, petitioner could not see his helper in the firebox (R. 30).

Petitioner testified that respondent's master mechanic showed him the broken bolt in the latter's office (R. 47). Respondent, however, did not call the master mechanic as a witness and did not produce the bolt at the trial.

Respondent, furthermore, offered **no** evidence to explain why the bolt broke. While there was testimony by respondent's witness, Kessler, of a test made of **some** bolt (R. 79-81), there was no evidence by the person who allegedly made the test, and there was no evidence to show that the bolt which was tested more than three years after the accident was the same bolt that actually was involved. In fact, on cross examination witness, Kessler, stated that the tested bolt "Failed due to bending" (R. 81). Respondent, furthermore, introduced no evidence of inspection of the bolt prior to the accident.

Respondent's witness, Kessler, a resident of Baltimore, Maryland, testified that he knew of the "practice" of respondent in purchasing bolts and nuts (R. 78). He described that practice as follows (R. 78):

> "Q. What is that practice; how are they purchased?
> A. The company receives an order with the instructions that the test department will either inspect the

material at the plant or waive inspection at that time and inspect it at the storehouses of the company."

It was undisputed that at the time of the trial petitioner was suffering from a compression fracture of one of his vertebrae. The factual issue was whether the accident in question caused the fracture. Respondent's witness, Dr. Ralph Pickett, examined and treated petitioner after the latter had been hurt (R. 84). The doctor testified on direct examination as follows (R. 84, 85):

"Q. You say that you took x-rays?

A. I had them taken at the hospital.

Q. Now, what, if anything, did you find as a result of those x-rays?

A. Both of my own personal study of the x-rays and **from the report of the x-rays specialists,** we found that there were no broken ribs, but there was an old compression of the eighth dorsal vertebra.

The Court: There was a what?

The Witness: An old compression of the eighth dorsal vertebra." (Emphasis supplied.)

On cross examination those x-ray reports, made by Dr. Erhard and Dr. Piatt to Dr. Pickett at the latter's request and incorporated as part of the Newark City Hospital records, were admitted into evidence (Pl. Ex. 4; R. 110, 158) (Pl. Ex. 5; R. 113, 159). These reports according to Dr. Pickett's own foregoing testimony constituted at least in part the basis for Dr. Pickett's opinion which he expressed on direct examination. The court, at the time these exhibits were admitted, limited the admission for the purpose of showing the information that Dr. Pickett had from these specialists (R. 111). A reference to those reports indicate that they are contradictory to Dr. Pickett's previously expressed opinion that the compression fracture was "old."

The District Court overruled respondent's motion for a directed verdict made at the close of petitioner's case (R. 77) and renewed at the close of all the evidence (R. 125).

The court submitted the cause to the jury under the doctrine of **res ipsa loquitur** (R. 133-135). The jury returned a verdict for petitioner for $32,000.00 (R. 159). The District Court overruled the respondent's motion for judgment in accordance with a directed verdict and granted its motion for a new trial unless petitioner agreed to a remittitur to $22,000.00 (R. 160). Petitioner did agree to such a remittitur (R. 160) and judgment overruling respondent's motion for new trial was entered on September 8, 1952 (R. 161).

On appeal the United States Court of Appeals for the Sixth Circuit stated in its opinion that a permissible inference of a defective bolt due to respondent's negligence was reasonably supported by the evidence (R. 177, 179). The Court (one judge dissenting) then held, however, that such inference was rebutted as a matter of law by what the majority termed the "uncontradicted explanatory facts" that the bolt was a new bolt selected by petitioner and that the bolt was not manufactured by respondent but purchased by respondent from another company (R. 178, 179). The Court of Appeals also held that the reports of the x-rays (Pl. Ex. 4 and 5) were not admissible as entries in the regular course of business under Section 1732, Title 28, U.S.C. (R. 180). The Court went on to hold that prejudicial error was committed by the District Court in commenting on these reports in its charge to the jury, even though that court had properly limited the use of the reports at the time that they were admitted into evidence (R. 181).

Judge McAllister, dissenting in part, held that the case was properly submitted to the jury under **res ipsa loquitur** (R. 182-184).

The judgment of the Court of Appeals reversed the judgment of the District Court and remanded the cause for a new trial (R. 174). In so holding, the majority of the Court of Appeals did not expressly rule upon certain of respondent's Statement of Points filed on appeal (the points are itemized, R. 161-174), as they concluded that the new trial would remove any objections (R. 181, 182).

Petition for certiorari was filed June 1, 1954, and on October 14, 1954, this Court's order granting writ of certiorari was entered (R. 184).

## VI.

## ARGUMENT.

**Summary.**

Two members of the Court of Appeals for the Sixth Circuit have upset a verdict and judgment for petitioner in the District Court. All four judges who have reviewed this case have agreed that the evidence raised a permissible inference of negligence on the part of the respondent. The majority of the Court of Appeals have held that this inference was rebutted as a matter of law. In so holding, the Court made a serious misstep into the exclusive province of the jury—the finding of facts. The claimed rebuttal was based upon the testimony that the bolt which broke was new and that the practice of respondent was to purchase its bolts from outside sources.

That evidence, even if accepted as conclusively established, does not meet the permissible inference of excessive or improper application of force from above by the operator of the manual hoist. Such inference remains without any explanation. The basic error was here implicit: the Court's own inference led it to conclude that a defect caused the bolt to break.

Nor was the inference of a negligent defect rebutted as a matter of law. In so holding the Court of Appeals again indulged in an inference to conclude that an overall practice of respondent was specific proof that the pertinent bolt had been purchased in accordance with the practice. Even more unwarranted was the inference that the bolt was purchased without notice of defect when there was no evidence of any inspection of the pertinent bolt or of any shipments of bolts received at the place of the accident. The Court

even went so far as to decide the credibility of respondent's witness, Kessler, by making his testimony conclusive.

The Court of Appeals took a long step backward in jurisprudence to those days when courts were astute to overturn factual conclusions by superimposing various theories of so-called law. A new bolt, according to the Court, could not be the subject of an inference of negligence. This is a strange proposition since the Federal Employers' Liability Act in plain language imposes a duty upon respondent to use due care to provide equipment without defects.

It was for the **jury** to accept or reject the so-called explanatory facts in this case, just as it was for the **jury** to accept or reject the permissible inferences of negligence. This is in accord with the leading decisions applying the federal law on res ipsa loquitur, and it is in accord with this Court's repeated admonition that the acceptance or rejection of factual inferences is for the jury. The Court of Appeals misquoted and misapplied the decision of this Court in **Sweeney v. Erving**, 228 U. S. 233, by confusing what makes a case for the jury with the burden of proof.

In short, if the decision of the Court of Appeals is allowed to stand, the rule of res ipsa loquitur laid down by this court has been seriously eroded. The right of petitioner to have factual issues decided by the proper fact-finding body, the jury, has, moreover, been seriously limited.

The Court of Appeals has held that x-ray reports of specialists made to respondent's doctor and incorporated into the hospital records of the treatment of petitioner are not admissible as entries under the Federal Shop Book Rule, Title 28, U.S.C. Section 1732. This holding involved a misinterpretation of this Court's reasoning in **Palmer v. Hoffman**, 318 U. S. 109, and further was contrary to the plain meaning of the statute.

Finally, the court's comment to the jury on the reports was not prejudicial to respondent. Those reports were admissible at any event on cross examination of respondent's doctor. Their use was limited at the time. The jury had the right to see and read those reports, and the comment by the court should not upset a verdict which was supported by other evidence on the factual issue of injury to petitioner.

**Questions 1 and 2**

These two questions may be considered together, since consistent reasoning and principles should be applied to the evidence in this case in resolving both questions.

The uncontroverted testimony of petitioner shows that he took from respondent's stock bin two new bolts of the usual size and type for the job in question. These bolts were used to secure a chain to a heavy ash pan. That pan was raised to a suspended position by a hoist or jack which was manually operated by another employee of respondent who was above the pan and in respondent's locomotive. Petitioner steadied and guided the pan from below. The pan, while suspended, suddenly fell and struck petitioner in the pit below because one of the bolts broke. The supply, condition and strength of the bolt and the action of the employee above were of course imputable solely to respondent. Under those circumstances the jury could properly infer that a negligently defective bolt or excessive and improper application of force from above, or both, caused the bolt to break and the pan to fall. The District Court was correct in so charging the jury (R. 134, 135).

Such application of the doctrine of **res ipsa loquitur** was correct under the leading decisions of this Court. **Johnson v. United States,** 333 U. S. 46; **Jesionowski v. Boston &**

**Maine Railroad Company**, 329 U. S. 452; **Sweeney v. Erving**, 228 U. S. 233. Such application was consistent, also, with principles and decisions in other cases applying the doctrine under federal law. **Sweeting v. Pennsylvania Railroad Company**, 144 Fed. (2d) 611; **Pitcairn v. Perry**, 122 Fed. (2d) 881; **Eker v. Pettibone**, 110 Fed. (2d) 451; **Central Railway Company of New Jersey v. Piluso**, 286 Fed. 661; **Taylor v. Reading Company**, 83 Fed. Supp. 80; **Propper v. Chicago, R. I. & P. R. Co.**, 54 N. W. (2d) 840, Supreme Court of Minnesota.

Indeed all four judges who have ruled on this case up to this point have agreed that the evidence in this case raised a permissible inference of negligence on the part of respondent. All three judges of the Sixth Circuit Court of Appeals concurred with the District Court on this point (R. 177, 178, 182).

The verdict of the jury, consequently, should have ended this case so far as permissible inferences of fact are concerned. Two members of the Court of Appeals, however, in a judicial departure from the principles laid down by this Court, held that the permissible inference of respondent's negligence had been rebutted as a matter of law (R. 178, 179). Their reasoning was based upon what they termed "uncontradicted explanatory facts" (R. 178); namely, that the bolt was "new" and that the bolt was not manufactured by respondent but purchased "in the usual course of business without notice of any defect" (R. 179).

The basic error in this holding is obvious: it is directly contrary to this Court's repeated holding that the province of fact-finding, which necessarily involves inference and speculation, is for the jury. **Lavender v. Kurn**, 327 U. S. 645. The basic misstep by the majority of the Court of Appeals led to a path of errors.

First of all, the so-called explanatory facts do not meet a permissible inference of improper and excessive force by the operator of the jack from above. Respondent did not produce at the trial the bolt which failed. Respondent did not call as a witness either the master mechanic who showed petitioner the broken bolt (R. 47) or the operator of the hoist. No explanation was offered as to why the bolt broke. Respondent's witness, Kessler, testified about the test of some bolt, but it was not shown to be the bolt which caused the pan to fall (R. 78-81). The tested bolt, moreover, failed due to bending (R., 81), yet was found to possess a tensile strength of 66,000 pounds per square inch! (R. 83) If such testimony was worth anything, it would imply that excessive force had been applied to that particular bolt. Implicit in the Court of Appeals' decision, then, was this error: the **Court** apparently inferred or assumed that a defect was the cause of the breaking of the bolt. Even assuming that the inference of defect had been rebutted as a matter of law, the Court of Appeals was wrong. The permissible inference of the operator's negligence remained without an iota of explanatory evidence. Precisely applicable is this Court's statement in the opinion in **Johnson v. United States**, 333 U.S. 46:

> "No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events."

The permissible inference of a defective bolt was not, however, rebutted as a matter of law. The Court of Appeals indulged in still further inferences in arriving at their "uncontroverted" conclusions of fact. From the testimony of respondent's witness from Baltimore that respondent's "practice" was to purchase bolts, the Court apparently as-

sumed or inferred that the pertinent bolt in Newark, Ohio, had been obtained in that manner. Not only that, but the Court made still another inferential leap to the factual conclusion that the bolt was purchased "without notice of any defect" (R. 179). Witness Kessler's testimony about respondent's "practice" was, of course, uncontroverted. Did that make it **conclusive**? The answer is obvious, yet the Court's opinion treated it as such.

How could petitioner's testimony that the bolt was new have anything to do with this case? Under Section 51 of the Federal Employers' Liability Act respondent is liable for a negligent defect in its equipment, new or old, and whether purchased from others or not. Respondent had a duty at all times and all places to use due care to furnish petitioner a safe place to work, including safe equipment. **Bailey v. Central Vermont Ry. Co.**, 319 U.S. 350. The duty to inspect applies, for example, to new as well as to old equipment. There was no proof that the bolt which broke was inspected before the accident; there was not even proof of any inspection of any particular shipment of which this bolt might have been a part.

Contrast the lack of explanatory evidence in this case with that involved in **Jesionowski v. Boston & Maine R. Co.**, 329 U.S. 452, where the decedent's own negligence may well have caused his death.

Compare, furthermore, the absence of explanatory evidence in this case with the requirements for a directed verdict laid down in the case of **Chicago & N. W. R. Co. v. Green**, 164 Fed. (2d) 55, at pages 59 and 60:

> "In connection with what we have said, there must be kept in mind the emphasis in the recent decisions of the Supreme Court that the scope of jury inference in cases under the Federal Employers' Liability Act must be liberally and not narrowly or stultifyingly viewed.

See Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574, 65 S. Ct. 421, 89 L. Ed. 465; Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520; Bailey v. Central Vermont Ry. Co., 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444. CF also Chicago & N. W. R. Co. v. Grauel, 8 Cir., 160 F. 2d 820. And traditionally, even more plenary than in cases requiring proof of specific negligence is the scope of inference which has been recognized as being open to a jury in situations of res ipsa loquitur.

* * * * * * * * *

"Only where defendant's evidence of **explanation** and exculpation is **so legally absolute that no possible hypothesis of proximate negligence can reasonably survive** it on the facts and circumstances of the accident is a court entitled to direct a verdict in a res ipsa loquitur case." (Emphasis supplied.)

The identical rule is stated in the syllabus by the Supreme Court of Minnesota in **Propper v. Chicago, R. I. & P. R. Co.**, 54 N. W. (2d) 840. Also see the decisions in **Atchison, Topeka & Santa Fe Railway Company v. Simmons,** 153 Fed. (2d) 206; **Terminal Railroad Association of St. Louis v. Staengel,** 122 Fed. (2d) 271.

The foregoing decisions lead us again to the basic error of the Court of Appeals: the invasion of the jury's province of fact-finding. This Court has held time after time that the acceptance or rejection of factual inferences is the exclusive function of the jury. The doctrine of **res ipsa loquitur** simply means that the **jury** may accept or reject the inference of negligence. Likewise it is for the **jury** to accept or reject any explanation. The jury is no more bound by the explanation than by the inference. This Court stated in the case of **Gleeson v. Virginia Railway Company,** 140 U.S. 435, at p. 444:

"The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing

if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility or of the Act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. **And it is for the jury to say in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances.**" (Emphasis supplied.)

Particularly pertinent and convincing is the reasoning of the Supreme Court of Ohio in the leading case in Ohio on **res ipsa loquitur**. **Fink v. New York Central R. Co.**, 144 Oh. St. 1. In that case plaintiff offered evidence of a derailment. Defendant's explanatory evidence was that a stalled car on the tracks caused the derailment. The court held that whether the explanation overcame the inference was a question of **fact** for the jury. The reasoning of the court is found at p. 10:

> "It would be a strange doctrine to say that in a jury trial the court is not permitted to draw the inference of negligence in a case which calls for the application of the rule and then to say that the court could determine as a matter of law that the inferences had been rebutted or destroyed by an explanation offered by the defendant, of the circumstances of the occurrence."

Finally, the majority of the Court of Appeals misinterpreted the reasoning of this Court in the case of **Sweeney v. Erving**, 228 U.S. 233. In referring to the definition of **res ipsa loquitur** contained in the **Sweeney** decision, the Court of Appeals in its opinion (R. 178) omitted the very heart of the definition, namely, "that they (the facts) make a case

to be decided by the jury." A **Complete** quotation of the definition found in **Sweeney v. Erving** is (p. 240 of the opinion):

> "In our opinion, res ipsa loquitur means that **the facts of the occurrence warrant the inference of negligence**, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; **that they make a case to be decided by the jury**, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the **jury** is whether the preponderance is with the plaintiff." (Emphasis supplied.)

The Court of Appeals for the Sixth Circuit confused what constitutes sufficient evidence "to make a case for the jury" with the burden of proof. The decision in **Sweeney v. Erving** was that the permissible inference of negligence under **res ipsa loquitur** does not shift the burden of proof. Of course not! That inference does, however, make a case for the jury. Indeed in **Sweeney v. Erving** the lower court **did** submit the case to the jury and a verdict for defendant resulted. It was plaintiff's contention in that case that the lower court erred in failing to charge that the burden of proof shifted to the defendant. The court held that the burden did not shift. The Court of Appeals, therefore, misinterpreted the **Sweeney v. Erving** rationale and disregarded the most important effect of **res ipsa loquitur**.

**Question 3.**

Respondent's witness, Dr. Ralph Pickett, examined and treated petitioner immediately after the latter had been

hurt (R. 84). X-rays were taken of petitioner's back at the Newark City Hospital at the request of Dr. Pickett. The latter in direct examination stated that he found an "old" compression of the 8th dorsal vertebra. The basis for that opinion, at least in part, consisted of the x-ray reports (R. 84, 85). On cross examination those x-ray reports, made by Drs. Erhard and Piatt and incorporated as part of the Newark City Hospital records, were admitted into evidence (Pl. ex. 4; R. 110, 158) (Pl. ex. 5; R. 113, 159). At the time these exhibits were admitted, the District Court carefully limited their admission to show the information Dr. Pickett had from these specialists (R. 111).

There is, of course, no question but that under any rule of evidence, the reports were admissible on cross examination to show the data upon which Dr. Pickett's opinion was based. This principle is contained in Volume III, **Wigmore on evidence** 3rd Edition, p. 630, Sec. 992(1):

> "The data on which an expert rests his specific opinion (as distinguished from the facts which make him skillful to form one at all) may of course be fully inquired into upon cross examination. Without them, the value of the opinion cannot be well estimated."

Independent of the foregoing, however, these reports were admissible as entries made in the regular course of business under the Federal Shop Book Rule. Title 28 U.S.C., Section 1732.

In denying admissibility of these reports, the Court of Appeals relied upon the decision of this Court in **Palmer v. Hoffman**, 318 U.S. 109, and upon several decisions by Circuit Courts (R. 180).

The decision in **Palmer v. Hoffman** has been misinterpreted by the Court of Appeals. This Court in the **Hoffman** case excluded an accident report made to a railroad for the

sound reason that such a report was not in furtherance of the railroad's business as such, but rather in furtherance of litigation (318 U.S., page 114). Furthermore, this Court soundly observed that reports preserving the litigant's version of an accident would not fall within the scope of those "records which experience had shown to be quite trustworthy" (318 U.S., page 113).

Those objections do not apply to the x-ray reports in this case. Those reports were incorporated into hospital records in the regular course of the business of that hospital, namely, the treatment of patients. Those reports, furthermore, were signed by the doctors who made them, and the hospital report was signed by Dr. Pickett himself (R. 112). It appears, therefore, that these reports were entirely trustworthy; indeed, if they had been slanted at all, certainly they would have been slanted in favor of respondent for whom Dr. Pickett was treating petitioner.

The Circuit Court decisions cited by the Court of Appeals are not determinative. The contents of these x-rays reports consist exclusively of **objective** observation of x-rays with the conclusion in each report based solely upon those objective observations. In each of the cases cited in the opinion of the Court of Appeals (R. 180) the reports and the records contained hearsay statements and history. No such hearsay opinion or history is contained in the pertinent x-ray reports.

The Court of Appeals conceded that a conflict exists among the circuits upon the admissibility of records under the Federal Shop Book Rule. We believe that the x-ray reports were admissible under any of the Circuit Court decisions. There is absolutely no doubt, however, that those reports would be admissible under the following decisions in the Second Circuit: **Korte v. New York, N. H. & H. R.**

**Co.**, 191 Fed. (2d) 86, C.A. 2nd, cert. denied, 342 U.S. 868; **Landon v. United States**, 197 Fed. (2d) 128, C.A. 2nd. The letters admitted in the **Korte** case go far beyond the objective reports on the x-rays in this case (Opinion, pp. 89, 90). Likewise the entries from the hospital record admitted in the case of **Landon v. United States** go far beyond the reports in this case. This is clear from the following holding at page 130 of the opinion:

> "Defendant takes vigorous exception to the admission in evidence of the 'Employee's Treatment Record' from the Medical Department of the plaintiff's employer at Kearny, New Jersey. The doctor in charge of the traumatic section of the company's hospital not only testified to all his treatment of the plaintiff, but also identified the record as one made in the regular course of business of his department. Admissibility appears to come within the very terms of the statute, 28 U.S.C.A., Section 1732, and we are at a loss to find basis for the exception. It is true that he was treated at once by the Roosevelt Hospital in New York City, where he remained for 21 days, and that the record here admitted begins with some recital of the previous case history. (The hospital records from the Roosevelt Hospital were already in evidence.) Further the record reports the diagnosis of another doctor identified by the testifying doctor, who would not himself make the diagnosis, but all this goes only to the weight of the evidence not to its admissibility, as the statute makes abundantly clear."

**Question 4**

This question is moot if our position in the preceding question is correct. In that event the reports were admissible as proof of the contents thereof.

Assuming that the reports were not admissible for that purpose, we submit that respondent was not prejudiced by any comment of the District Court. As we have pointed out, the reports were clearly admissible on cross examina-

tion to show the basis for Dr. Pickett's opinion expressed on direct examination (R. 84, 85). The District Court limited the use of this evidence at the time of admission (R. 111). . .

The jury was, therefore, entitled to those reports in the deliberating room, and the Court's later comments were not prejudicial. In the case of **Masterson v. Pennsylvania R. Co.**, 182 Fed. (2d) 793, cited by the Court of Appeals in its opinion (R. 180), it was held that the improper admission of certain medical letters was not prejudicial to the defendant-appellee.

In this case other evidence supports the conclusion that petitioner's compression fracture was not "old." Petitioner's witness, Dr. Clybourne, testified in response to a hypothetical question that the type of injury petitioner received caused the compression fracture (R. 67). Petitioner testified that he worked as a boilermaker up to the time he was injured on June 22, 1948 (R. 5). Prior to the accident of June 22, 1948, and shortly after a previous injury, petitioner, furthermore, performed the extremely rough job of riveting with an air hammer (R. 46). Dr. Pickett himself testified about the appearance of another fracture after the accident, that of the sixth dorsal vertebra, and then requested that petitioner be sent to respondent's hospital in Baltimore (R. 119). There is, therefore, ample evidence—indeed overwhelming evidence—that the compression fractures of petitioner's back were not "old," but rather a result of the accident of June 22, 1948.

It is indeed significant that after the District Court admitted the x-ray reports over strenuous objection of respondent's counsel, the latter did not see fit to call either x-ray specialist as a witness. This leads to another basis for admitting the reports. They were reports made by spe-

cialists at the request of a doctor retained by respondent. Those reports were incorporated into a hospital record signed by that same doctor. He in effect adopted those reports as his own.

In any event there was no prejudice to respondent in the handling of the x-ray reports. The petitioner should be restored his judgment against respondent.

## VII.

## CONCLUSION.

Petitioner was hurt on June 22, 1948. On May 14, 1952, he was awarded damages of $32,000.00 by the fact-finding body. The District Court was the first to intrude into the realm of the jury when that Court reduced the damages to $22,000.00 as a condition of overruling respondent's motion for a new trial. This unwarranted reduction petitioner accepted rather than to incur the expense and endure the delay of another trial. Petitioner was then forced to wait two more years pending appeal by respondent. The outcome was a further usurpation of the jury's province by the Court of Appeals, along with another trial and more delay.

The Court of Appeals did not expressly rule upon all of the points assigned for review in that Court by respondent. In the conclusion of its brief opposing petition for certiorari respondent complains of petitioner's request for affirmance of the District Court's judgment. Petitioner emphatically repeats that request. At this point, just short of seven years after his injury, he is entitled to his judgment against respondent.

In his petition for certiorari petitioner set forth all the respects in which he had been aggrieved by the decision of

the Court of Appeals. He could do no more. Respondent, on the other hand, complained in its brief that petitioner was granted a second day in court by the decision of the Court of Appeals; yet respondent took no action for cross-writ. As to the points passed over by the Court of Appeals, respondent made no move toward obtaining a decision thereon.

The Court of Appeals obviously gave the cavalier treatment to the points upon which it did not expressly rule (R. 181, 182). The Court did not take those points seriously. When the Court came upon a matter which it considered to be serious (the x-ray reports), the subject was explored fully and the alleged error clearly delineated. Yet the comment concerning those reports, like other claimed irregularities, might or might not recur if a new trial were had.

The record printed in this Court includes the entire transcript of the testimony adduced at the trial, with the exception of the testimony of one W. W. Mitchell. His testimony has no bearing upon this review. The entire charge of the District Court is also included (R. 125-157), along with the complete Statement of Points assigned by respondent for review by the Court of Appeals (R. 161-174). The entire record printed for the appeal to the Court of Appeals was filed with the petition for certiorari.

This Court has dealt with analogous situations by considering and disposing of all alleged errors. In the following cases where a judgment for plaintiff had been reversed by a circuit court without passing upon all of the errors assigned by defendant, this Court made final disposition of the appeal and affirmed the judgment of the district court. **Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.**, 340 U. S. 211, 214, 215; **Story Parchment Company v.**

**Paterson Parchment Paper Co.**, et al, 282 U. S. 555; **Cole v. Ralph**, 252 U. S. 286, 289, 290. In the **Story Parchment Company** case, supra, this Court stated at pages 567 and 568:

> "Other assignments of error made on the appeal from the district court were not considered by the court below. No argument in support of these assignments has been submitted here, and respondents assume that they will be remitted for the consideration of the court below if the judgment of that court be reversed. The entire record, however, is before this court with power to review the action of the Court of Appeals and direct such disposition of the case as that court might have made of it upon the appeal from the district court. Luscher & Moore Lumber Co. v. Knight, 217 U. S. 257, 267; Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 588. And see Langres v. Green, supra. Accordingly, we have examined these assignments, some eight in number. One or more of these involve questions which have been disposed of by the foregoing opinion. We find nothing in any of the others of sufficient substance or materiality to call for consideration.
>
> The judgment of the court of appeals is reversed and that of the district court affirmed."

In view of petitioner's long wait for his just relief, the manifest errors of the Court of Appeals, petitioner's prosecution of the appeal of all harmful errors to this Court, and respondent's failure to do likewise, this Court should end this litigation and restore to petitioner his judgment against respondent.

Respectfully submitted,

C. RICHARD GRIESER,
8 E. Broad St., Columbus 15, Ohio,
Attorney for Petitioner.